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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, *et al.*,
Appellants,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This is an appeal from a final judgment holding that the equal protection clause cannot accommodate a governing body in New York City which, for nearly a century, has achieved the delicate balance of regional and local interests essential to the effective democratic governance of our Nation's largest metropolis.

The governing body at issue—the New York City Board of Estimate—is composed of three members elected by all City voters, who (with two votes each) together control a majority of the Board's votes, plus one member elected by the voters of each of the five counties or "boroughs" that comprise New York City, who (with one vote each) together make up the Board's minority. Properly computed, the deviation from strict voter equality which this system produces is no greater than 31%. In upholding a challenge to the Board's electoral system, however, the courts below held that the majority citywide votes could not be considered in assessing whether the Board's composition complied with the principle of one person, one vote; owing solely to a 132% population disparity among the five boroughs, the courts ruled that the Board's makeup was unconstitutional. The substantial constitutional questions these rulings raise are:

1. In an apportionment case involving a limited-purpose regional governing body for a municipality that is an amalgam of numerous different political subdivisions, including five distinct boroughs whose disparate populations exceed deviations previously approved for legislative districts, does the equal protection clause forbid a state from delegating essentially nonlegislative local powers to an elected board composed of three at-large officials who cast a majority of the board's votes and five local officials, one from each borough, who together cast a minority of the board's votes, where the deviation from strict voter equality, in light of the at-large votes, does not exceed 31%?

2. In an apportionment case in which a majority of the votes on an elective regional governing board is allocated to members elected at-large by all voters, with the remainder of the votes

allocated equally among members elected from boroughs of differing populations, does the equal protection clause require a court, in determining whether the board's voting structure comports with the principle of one person, one vote, wholly to disregard the representation afforded the voters of all boroughs by the at-large members?

3. In an apportionment case in which the voting structure of a substate regional governing body concededly promotes legitimate and historic state interests, without a hint of invidious purpose or effect, does the equal protection clause require a court, in assessing whether those interests justify deviations from strict voter equality, to apply the "least restrictive alternative" test which this Court applied to congressional apportionments in *Karcher* v. *Daggett*, 462 U.S. 725 (1983)?

PARTIES

Appellees, plaintiffs below, are three registered voters in the City of New York who reside in the Borough of Kings, better known as Brooklyn.

Appellants are the City of New York, a municipal corporation in the State of New York; the New York City Board of Estimate, a governing body comprised of eight elected officials which operates pursuant to sections 61 and 62 of the New York City Charter; and the eight members of the Board of Estimate. The eight members of the Board of Estimate are Edward I. Koch, the Mayor of New York City; Andrew J. Stein, the President of the New York City Council; Harrison J. Goldin, the Comptroller of the City of New York; Howard Golden, the President of the Borough of Brooklyn; Fernando Ferrer, the President of the Borough of the Bronx; David N. Dinkins, the President of the Borough of Manhattan; Claire Shulman, the President of the Borough of Queens; and Ralph J. Lamberti, the President of the Borough of Richmond (or, as better known, Staten Island).

Also an appellant here is Robert Straniere, a member of the New York State Assembly who intervened as a defendant below and who joins this Jurisdictional Statement.

Frank Ponterio, a resident of the Borough of Richmond who intervened as a defendant below, is also an appellant but does not join this Jurisdictional Statement.

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JURISDICTIONAL STATEMENT

This case raises issues of first impression for this Court—and of broad significance for the structure of regional and local governing units throughout the United States.

The City of New York, its Board of Estimate, each of the Board's eight members, plus an intervenor state legislator, appeal from a final judgment of the United States Court of Appeals for the Second Circuit, entered October 8, 1987, holding that sections 61 and 62 of the New York City Charter violate the equal protection clause of the fourteenth amendment to the Constitution.

The judgment invalidates the voting system of the Board of Estimate, a body which, since 1901, has been a vital instrument of New York City's government. Conceived to address local problems transcending traditional geographic boundaries, and to temper local decisions with regional concerns, the Board employs a voting system critical to its functions: each of the five executives elected by the City's counties or "boroughs" has one vote on the Board, while the three officials elected by the voters of the City as a whole, with two votes each, comprise the Board's majority. This voting system—carefully tailored to give majority control to citywide officials while preserving a meaningful voice for

local interests—arises directly from the Board's highly localized powers over service delivery and land use.

This Court has never had occasion to consider the proper application of the one person, one vote principle to substate limited-function governing bodies, such as the Board of Estimate, which attempt to harmonize regional demands and local concerns through a voting structure which gives majority control to at-large regional interests while treating the constituent localities alike. This Court also has never determined the proper means to calculate deviations from strict voter equality stemming from a voting structure that combines an at-large majority with equal votes to officials elected from districts of differing population. And this Court has not resolved the weight the lower courts must give to legitimate state interests justifying deviations from strict voter equality.

In applying the one person, one vote principle in this case, the courts below disregarded the special characteristics of the Board of Estimate and other limited-power regional governing bodies. Ignoring mathematical common sense, the lower courts excluded the citywide majority votes from consideration of the relative voting strength of New York City's voters to elect the Board of Estimate, and instead calculated the deviations from strict equality based solely on the population differences among the five City boroughs. Having thereby produced an exaggerated portrait of deviations from strict voter equality, the lower courts then applied the "least restrictive alternative test"—adopted by this Court for congressional redistricting cases—to conclude that New York's substantial and legitimate interests in adopting the Board's voting system could not justify the disparities in voter equality which that system occasioned.

This result threatens more than the dismantling of New York City's oldest government institution. The rulings below pose an insurmountable obstacle to local innovation in shaping popularly-elected regional bodies to address specific local problems. The need of the future is for more, not less, regional government; for more, not less, cooperation among villages, towns, cities, counties, and states; for more, not less, recognition of the interdependence of disparate political communities in the use of local land and

resources—precisely the matters over which the Board exerts jurisdiction. An overly rigid application of the one person, one vote principle, blind to the realities of how such regional bodies come into being and how they operate, can only frustrate state efforts to balance centralization with local autonomy, majority authority with minority representation, and relative efficiency with participatory and responsive government.

Nothing in this Court's prior decisions on the principle of one person, one vote warrants these results. This case merits plenary review to resolve these fundamental questions.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 and appears in the Appendix at page 5.

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reproduced in the Appendix at page 55 and page 119 and reported at 592 F. Supp. 1462 and 647 F. Supp. 1463.

The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a decision dated May 16, 1983, held that the New York City Board of Estimate is subject to the one person, one vote principle. This decision, which reversed the initial judgment entered by the trial court, appears at page 186 of the Appendix and is reported at 707 F.2d 686.

The first decision of the United States District Court for the Eastern District of New York appears at page 208 of the Appendix and is reported at 551 F. Supp. 652.

JURISDICTION AND HOW THE FEDERAL QUESTION WAS RAISED

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. §§ 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987. A Notice of Appeal to this Court on behalf of the municipal appellants was timely served on the parties and filed in the Court of Appeals on October 15, 1987. Intervenor Robert Straniere served and filed a timely Notice of Appeal on November 6, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2) in that the Court of Appeals held a state statute to be repugnant to the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISION AND STATE STATUTES

The Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

> Section 61: *Membership.* The mayor, the comptroller, the president of the council, and the presidents of the boroughs shall constitute the board of estimate.
>
> Section 62: *Voting in the board.*
>
> a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.
>
> b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.
>
> c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.
>
> d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

The Structure and Functions of the New York City Board of Estimate

New York City is the most heavily populated municipal corporation in the United States. Within its 320 square miles, embracing five counties, live over seven million people: approximately 2.2 million in Kings (Brooklyn); 1.9 million in Queens; 1.4 million in Manhattan; 1.2 million in the Bronx; and 350,000 in Richmond (Staten Island). The entire City voting population elects three officials at-large: The mayor, the president of the City Council, and the comptroller. In addition, the voters of each county elect a chief county executive known as the borough president. By law, the three City-wide officials, each with two votes (thus commanding a majority), and the five borough presidents, each with one vote, sit as members of the New York City Board of Estimate. N.Y.C. Charter ("Ch.") §§ 61, 62(a).

The Board of Estimate is not a legislature. New York City does not have a bicameral legislature. The legislative power in the City resides solely in its City Council, whose members are elected from districts drawn on the basis of population. Ch. §§ 21, 22. Enactments of the City Council become law upon approval of the Mayor and only the Mayor. *Id.* § 38. The Board of Estimate is not a part of that process. It has no power to make law. It cannot enact legislation to bind anyone. It cannot outlaw conduct. It cannot levy taxes. It cannot adopt or reject laws for the general welfare. With one limited exception—its narrow participation in the budget-making process—the Board has no say in any action the City Council takes. And, with that one exception, the Board cannot exert power of general applicability to all citizens of New York City.

The Board of Estimate, instead, exercises jurisdiction over extremely local matters. Its four major areas of responsibility are (1) to make final determinations on the use, development and improvement of land within the City of New York, (2) to approve contracts for City services not subject to public bidding, (3) to grant franchises to operate City services or to use City land, and (4) to approve the disposition of City-owned land. The exercise of each of these powers affects New York City's residents differently depending on where people live. Thus, the Board has the power to decide whether to locate a waste disposal plant near a housing development, or in what communities to situate detention facilities, drug rehabilitation centers and shelters for the homeless. Similarly, the Board determines whether to issue a bus franchise in one borough, or to license a vendor to place a newsstand on a street corner in another, or to grant a franchise for cable television in a third.

The rationale for equal representation of the five boroughs in the Board's voting system is neither contrived nor quixotic, but stems from the fact that the Board's micro-decisions have a disparate impact on people based on where they live. Precisely because land-use and municipal-service decisions touch residents of each borough in vastly different ways, the citizens of each borough—particularly those in the smaller ones, Staten Island (which has the largest tracts of undeveloped land) and the Bronx—have a compelling interest in participating equally in those decisions. A tradition of borough-president deference, which equality promotes, enables a borough president to command the support of his or her fellow borough presidents on any issue which affects only his or her constituency. The result is that a local preference controls unless all three citywide officials vote to the contrary.

Apart from these highly localized powers, the Board also has a circumscribed role in the City's budget-adoption process. In this role, the Board has no power to adopt or reject any budget on its own. Rather, after the mayor proposes a budget, the Board, subject always to the consent of the City Council, may only "increase, decrease, add or omit" specific units of appropriation. N.Y.C. Charter §§ 120(a), 222(a). If the City Council fails to

consent to the Board's changes by June 5 of any year (or if the Board objects to changes the City Council proposed), then the "budget and tax rate adopted as modified for the current fiscal year" is extended until a new budget is adopted. *Id.* §§ 120(c); 222(b). Even if the City Council approves the Board's changes within the statutory timetable, the mayor (who does not vote as a Board member on the budget) may still veto the changes—a veto that cannot be overridden absent a two-thirds vote of the City Council or the Board; if one body votes to override, the other must approve the override by a majority vote. *Id.* § 121(b); § 223(c).

Together with the Board's other functions, this limited participation in the budget process has long been a key ingredient in the City's ability to provide cohesive government to its five disparate boroughs.

The History and Operation of the New York City Board of Estimate

New York City is the product of consolidation, in 1898, of an assortment of neighboring political subdivisions. 1897 N.Y. Laws ch. 378, § 1. "To fuse the multifarious powers, duties and functions of the various municipalities concerned, involving as they do the conveniences, the necessities, the nearest interest of 3,000,000 of people into a unit of governmental care and control was a task of no ordinary magnitude." A. Green, *The Greater New York Charter* iv (1897). The distinct histories, demographics, topographies, and social and economic characteristics of these communities, and the simple yearning for a government close to home, posed a formidable obstacle to consolidation. *Id.* at iv-vi. To obtain cession of local control to a distant central government, to persuade people to forgo home rule for the greater good, required some assurance that a meaningful voice responsive to local concerns would be heard on matters having a peculiar local impact.

The Board of Estimate became the vehicle for expressing that balance. In 1901, two years after consolidation, New York State revised the City Charter to provide for a Board of Estimate composed, as it remains today, of three citywide officials and the presidents of the five boroughs. 1901 N.Y. Laws ch. 466, § 226. The boroughs were obvious choices as local units within the

regional government. The borough lines conformed to pre-existing governmental boundaries—and to nature: Two surrounded by water (Staten Island and Manhattan), a third a peninsula (the Bronx), the other two (Kings and Queens), also part of an island, divided by the onetime boundary of the City of Brooklyn. The boroughs retained—and indeed, until 1962, continued to retain—substantial powers over certain vital local services like streets and sewers and sidewalks. (CA50). The borough presidents exercised significant executive authority within their own territory while also participating, as members of the Board, in City management. *(Id.)*[1]

From the very outset of consolidation, basic to the Board's composition was that citywide members would control the majority voting power. The 1901 Charter revision allocated three votes to each of the three citywide officials, one vote to each borough president, and, with 88% of the City's population then resident in the two more developed boroughs, one additional vote each to the presidents of Manhattan and Brooklyn. (CA41). In 1958, in recognition of actual and anticipated growth in the other boroughs, and the local impact of the Board's decisions on each borough, a Charter revision adopted the system that exists today: each citywide official was given twice the number of votes (four) as the equal number (two) given to each borough president (CA47); to make the math simpler, a 1978 Charter revision halved each member's vote (Ch. § 62).

Usually, history shows, the entire Board has acted unanimously. (CA66-68, 73, 75, 77). The compact size of the Board, the status of its members as the highest elected officials in the region, the equality accorded to each borough president, the collegiality such equality occasions, the tradition of borough-president deference and, most important, the controlling authority wielded by the citywide members, have encouraged and produced consensus on regional priorities essential to the cohesive governance of a sprawling metropolitan area. (CA75, 85, 124-25, 152-

1. Numbers in parentheses preceded by the letters "CA" refer to pages of the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

Numbers in parentheses preceded by the letters "JA" refer to the Appendix to this Jurisdictional Statement.

54). These dynamics of the Board dilute parochialism, invite balanced perspectives, compel reasoned resolution of conflicts between regional and local interests, and permit decisive action based on broad popular support. (CA125, 716-29).

Until the rulings below, no court had held that the equal protection clause precluded such an effective regional governing body. In fact, in the only decision to consider the matter—*Bergerman* v. *Lindsay*, 25 N.Y.2d 405, 306 N.Y.S.2d 898, 255 N.E.2d 142 (1969), *cert. denied*, 398 U.S. 955 (1970)—New York's highest court held that the one person, one vote principle did not even apply to the Board of Estimate.

Proceedings Below

In December 1981, appellees commenced this action seeking a declaration that the makeup of the Board of Estimate infringed their constitutional right to equal representation, and demanding an injunction compelling appellants to remedy the alleged infringement. (CA8-14). On December 1, 1982, relying on *Bergerman*, the United States District Court for the Eastern District of New York (Neaher, J.) granted appellants' motion for summary judgment dismissing appellees' complaint on the ground that, as a matter of law, the Board of Estimate is not subject to the principle of one person, one vote. On May 16, 1983, the United States Court of Appeals for the Second Circuit reversed and remanded the case for a hearing on whether the Board's makeup offended the equal protection clause. (JA186, 200-01, 207).

Upon remand, the trial court bifurcated the issues for decision. First, on August 21, 1984, the District Court excluded the six-vote majority of the citywide officials from consideration of the relative voting strength of City residents to elect the Board of Estimate. Adopting a test supposedly derived from *Abate* v. *Mundt*, 403 U.S. 182 (1971), the trial court examined only the deviations expressed in the votes of the borough presidents. The Court divided the City's population into five, thereby obtained the population of the supposedly ideal district (1,414,206), and then added the percentages by which the populations of the largest borough (Brooklyn) and the smallest (Staten Island) deviated

from this "ideal." The result was a deviation of 132.9%. (JA 163-64).

Subsequently, on November 19, 1986, the District Court ruled that the City had failed to justify this adjudged deviation. While acknowledging the legitimacy of historic, geographic and functional reasons supporting the Board's voting system, the Trial Court held that, under this Court's decision in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), states must fashion substate governing units that are "least restrictive" of voting rights. Consequently, said the Court, the existence of alternative plans with smaller deviations from strict voter equality is alone sufficient to override any state interests justifying New York's attempt to reconcile competing regional and local demands.

On October 8, 1987, the Second Circuit affirmed. The Court of Appeals (per Oakes, J.) held that "in calculating voter equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis." (JA33). The Court also adopted, without discussion, the trial court's view that any alternative plan with smaller deviations outweighs any state interests justifying larger deviations. (JA38-39). In a separate concurrence, Judge Newman, while joining the majority, opined that in some circumstances the equal protection clause might permit local governments to combine "dominant" at-large members with single-member districts of different populations. (JA51-53).

This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

THE DETERMINATIONS OF THE COURTS BELOW (1) TO DISREGARD THE BOARD OF ESTIMATE'S SPECIAL CHARACTERISTICS AS AN INNOVATIVE FORM OF REGIONAL GOVERNMENT EXERCISING LOCAL POWERS; (2) TO IGNORE THE MAJORITY VOTES OF THE CITYWIDE MEMBERS OF THE BOARD OF ESTIMATE IN CONSIDERING WHETHER ITS VOTING STRUCTURE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT; AND (3) TO APPLY THE LEAST RESTRICTIVE ALTERNATIVE TEST IN ANALYZING WHETHER THE BOARD'S VOTING STRUCTURE ADVANCES ADMITTEDLY LEGITIMATE STATE POLICIES, RAISE SUBSTANTIAL QUESTIONS WHICH SHOULD BE PASSED ON BY THIS COURT.

The Board of Estimate is a vital instrument of New York City's government. For over eighty years, the Board has fostered the growth, development and effective government of our Nation's largest city. No prior application of the principle of "one person, one vote" outlawed regional governing entities which parallel the Board's composition. No finding of invidious purpose or result prompted the lower courts to reach their conclusion. No evidence of arbitrary whim, or of gerrymander, or of racial mischief, informed the judgment below. No facts suggested that the Board was unresponsive to the popular will or the hostage of a narrow minority of the city's populace. No party denied that the Board is and has been an effective and efficient instrument of regional government well-suited to its limited purposes.

Animating the judgment, rather, is the perception that the Board's blending of citywide and local representation is inconsistent with the one person, one vote rule as applied to traditional legislative bodies. The lower courts disregarded the Board of Estimate's important but limited role as a regional government body, disregarded the representation all City voters enjoy on that body by reason of the majority at-large members, and disregarded the reasons why New York State assigned one vote to each borough member on the Board. Instead, the courts treated the Board as if the Board were a five-member legislature composed only of representatives of the five boroughs, computed a deviation

that bears no likeness to reality, and imposed on the State the impossible burden of showing that no other system of government could lessen the deviations.

The questions this judgment raises—on the proper standard for assessing the constitutionality of limited-power regional governing bodies, on the proper method for weighing the Board's at-large majority in comparing relative voting strength, and on the test for determining whether a state has justified deviations from strict equality—merit plenary review in this Court. Summary disposition of those issues not only would be an injustice to the people of this country's most populous metropolis, but also would stifle innovation and experiment in fashioning local governments throughout the land. The very nature of the issues presented and the consequence of a declaration of unconstitutionality call for full, thorough and plenary consideration, with briefs on the merits and oral argument, for their proper resolution.

The principle of one person, one vote was created to eradicate inexplicable or unjustified deviations in legislative apportionments. This Court has never addressed the standards courts must employ in assessing the constitutionality of entities, such as the Board of Estimate, which act as essentially regional substate governments with powers over largely local matters and which assign to an at-large membership a majority voting bloc. Yet a basic difference exists between such an entity and the more conventional ruling bodies to which application of the one person, one vote principle is familiar. The conventional ruling body, a legislature, usually exerts power—a tax cut, a seat belt law, a human rights ordinance—which affect people in ways unrelated to where they live. However convenient preexisting boundaries may be in drawing lines for such legislative districts, the boundaries have little or nothing to do with the existence of the government power or the work the government performs.

The same cannot be said of the Board of Estimate or like governing bodies. A direct relationship exists between the Board's formation and functions, and the historic, geographic, and political boundaries of the boroughs reflected in the Board's

representation. Those boundaries have a meaning to the Board which extends far beyond the convenience of using lines that are already there. Respecting the boundaries is not only of practical necessity to the work of the Board but also of vital importance in preserving some voting power over government action that affects people in special ways precisely because of where those people live. Staten Island's borough president has an equal vote on the Board of Estimate not because using an island is a nice way to form a district, but because Staten Island's land is controlled by a central authority whose decisions about that land peculiarly affect the people of Staten Island solely owing to their residence there.

Throughout its pronouncements on the breadth and application of the one person, one vote rule, this Court has continually and consistently affirmed that the rule should not serve to frustrate the need of local governments for flexibility in devising governmental structures responsive to local needs. *See Sailors* v. *Board of Education*, 387 U.S. 105, 110-11 (1967) ("[V]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions"); *Dusch* v. *Davis*, 387 U.S. 112, 117 (1967) ("The [local government plan] seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside"); *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971) ("[L]ocal governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs").

In *Avery* v. *Midland County*, 390 U.S. 474 (1968), the opinion on which the Court of Appeals relied in striking down the Board of Estimate's voting scheme, this Court reaffirmed the special deference accorded states in fashioning substate governing units (390 U.S. at 485):

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not

> require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.

After citing *Sailors* and *Dusch*, this Court added:

> The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government.

The Board of Estimate is precisely the kind of innovative local governing body to which this Court's decisions refer. The lower courts' failure so to recognize preordained their decisions to disregard the citywide members who control the Board's majority and to ignore the substantial interests justifying the Board's composition. The special role the Board plays in substate government, its blending of at-large and local votes, and the relationship between its role and its electoral design, require that the Board be weighed on a different and a more sensitive scale than that used to assess traditional legislative bodies. Such an approach would have shown that the deviations from strict equality occasioned by the Board were within constitutional limits for governing bodies like the Board and amply justified by legitimate State interests. Plenary review is essential here to provide the guidance to the lower courts to remove the "roadblocks in the path of innovation, experiment, and development" which the ruling below creates.

(2)

In determining whether the Board's composition and voting structure comply with the one person, one vote rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the courts below chose to ignore the Board's citywide members and their six majority votes and determined the equal protection issue as if the Board contained only the borough presidents. No decision of this Court supports the doctrine that, in determining whether an elective government body is consonant with the equal protection clause, the courts should disregard its majority and focus solely upon its minority. The analysis of the Board's deviation from perfect mathematical equality may pose problems not faced in evaluating more traditional forms of elected bodies, *see, e.g., Abate* v. *Mundt, supra,*

403 U.S. at 184, n.1, but this is no excuse to disregard this Court's repeated statements recognizing the need of local bodies for innovative structures. The failure of a governmental body to fit into traditional structures more readily analyzed by simple mathematics cannot be a basis for ignoring the actual dynamics of the body. Rather, as the Court of Appeals itself recognized in its first ruling in this litigation, the "novel issues" concerning representation on the Board mandate assessment of the total representation, not to splinter it and ignore a major component of such representation. (JA207).

Appellants presented below a means of assessing such representation—the Banzhaf Index—which results in a maximum deviation from exact mathematic equality of 30.8% (JA41-42). Under this Court's precedents, such a maximum deviation lies within permissible bounds if in furtherance of reasonable governmental policies. *See Brown* v. *Thomson*, 462 U.S. 835 (1982); *Mahan* v. *Howell*, 410 U.S. 315, 319 (1973). The use of Banzhaf's mathematical model, premised on computer analyses of voting combinations, is an accepted method of calculating the constitutionality of weighted-voting schemes, and the Banzhaf concept of a representative's voting power has been explicitly approved by the Court of Appeals for the Second Circuit. *See League of Women Voters* v. *Nassau County Board of Supervisors*, 737 F.2d 155, 157-160, 164-171 (2d Cir., 1984), *cert. denied*, 469 U.S. 1108 (1985), citing *Franklin* v. *Krause*, 32 N.Y.2d 234, 344 N.Y.S. 2d 885, 298 N.E.2d 68 (1973), *appeal dismissed for lack of a substantial federal question*, 415 U.S. 904 (1974); *see also Greenwald* v. *Board of Supervisors*, 567 F. Supp. 200, 203 (S.D.N.Y., Weinfeld, J.), *aff'd without opinion sub nom. Haas* v. *Sullivan Co.*, 742 F.2d 1433 (2d Cir. 1983).

This Court has previously held that, if a state's voting system is facially and mathematically in compliance with the one person, one vote rule principle, the use of the Banzhaf Index to calculate relative voting strength is alone insufficient to show that a state's apportionment system is unconstitutional. *See Whitcomb* v. *Chavis*, 403 U.S. 124, 144-46 (1971). But neither *Whitcomb* nor any other ruling of this Court contemplates or permits the lower

courts to disregard the majority (or any other portion of a governing body's membership). Here the issue is not whether the Banzhaf Index (or any other method) is the only proper way to measure deviations in complicated voting systems, but rather whether that Index (or some other method that takes account of at-large and local votes) is a necessary and permissible means of determining deviations when a voting system combines two different forms of representation.

The lower courts rejected the use of the Banzhaf Index and chose, instead, not to attempt to measure the significance of the majority citywide votes. Even assuming, however, that the Banzhaf Index is deemed to be an inappropriate "mathematical formula that establishes what range of percentage deviations is permissible" (*Mahan* v. *Howell*, 410 U.S. 315, 329 [1973]), the courts should not, for that reason, ignore the citywide members of the Board. In disregarding the Board's majority, and computing only the population variances among the City's five boroughs, the courts below ruled on the constitutionality of a government plan which does not exist.

It is no answer to say, as the courts below did, that City dwellers may have different interests as residents of the City as a whole and as residents of the respective boroughs. The differences, if any, in the respective interests of the citywide and borough representatives may require different mathematical models to assess such dual representation, but those differences cannot authorize a court to ignore an important component of such representation. Otherwise, the court cannot properly assess the harmony of the Board's electoral system with "the guarantee of equal voting strength for each voter." *Hadley* v. *Junior College District*, 397 U.S. 50, 58 (1970).

This Court's instructions are essential to give meaning to its repeated admonitions that states retain flexibility to adapt substate governing structures to suit particularized needs. The rulings below raise substantial questions about the methods of computing relative voting strength in electoral bodies that combine a majority at-large membership with a minority membership representing constituencies of differing sizes. These questions are of great significance to all states, to the future of regional

government, and to the people of New York City. This Court should address those questions upon full consideration of the record.

(3)

The holdings of this Court make clear that deviations from mathematically-equal voter parity may be justified by valid state interests. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 579 (State may depart from strict population equality where justified by "legitimate considerations incident to the effectuation of a rational state policy"); *accord*, *Mahan* v. *Howell*, *supra*, 410 U.S. at 325. Furthermore, where there is no indication of arbitrariness or discrimination, "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." *Brown* v. *Thomson*, *supra*, 462 U.S. at 847-48.

Appellants established below that the voting structure of the Board of Estimate furthered important state policies. The present composition of the Board promotes a compromise between regional and local concerns in the exercise of local police powers—such as powers over land use—which elsewhere in New York are reposed in the smallest political subdivisions. The need for regional institutions of this type is manifest: The efficient deployment of resources and the orderly development of land compel cooperative ventures in service of the general welfare. The interdependence of activities within a metropolitan area—the demand for housing and roads and sewers and security and services—requires area-wide institutions to perform certain government functions. (E.g., CA813-18). Yet a basic political reality confronts a state in shaping such substate units to address regional needs: No tradition is more firmly implanted on our body politic than that of home rule. People want some control over their own affairs; they demand a say on matters closest to home; they insist on the right to participate in decisions that will affect their community. And nothing so sharply engages this interest as decisions on the use of land and government property.

The tension between the need for regional governing entities and traditions of local independence etches in sharp relief the policies the Board of Estimate embodies. The policy of New York State—and of every state—is to delegate police powers over

land, government property, and contracts for basic government services to the smallest political subdivisions within the State. This policy expresses a decision that people should have a meaningful voice, through elected officials at the most local level, in decisions that most directly affect their communities. The peculiar needs of New York City—the need to bring a controlling citywide perspective to competing local demands—required some accommodation of that policy to address regional problems. The Board of Estimate is the mechanism to achieve regional goals consistent with the policy of local governance, to permit the proper ordering of citywide priorities while giving the people a say in decisions that peculiarly affect them owing to where they live. (E.g., CA153-54, 712-29).

There is more. The Board's composition is consistent with and helps to preserve the existing borough boundaries within the City. *Brown* v. *Thomson, supra,* 462 U.S. at 847; *Mahan* v. *Howell, supra,* 403 U.S. at 321-22. The Board's voting system assures a voice to the political, historic and geographic subdivisions within the City. *Mahan* v. *Howell, supra,* at 321. The Board has performed its role effectively, and assured meaningful representation to citizens in all the boroughs, including those in Staten Island, which contains the fewest residents but which, as the least developed of the boroughs, gives rise to many of the City's land use issues. Finally, there is simply no evidence that the Board's voting system is predicated on arbitrary or invidious distinctions. *Avery* v. *Midland County, supra,* 390 U.S. at 484.

The record thus establishes that deviations from voter parity by reason of the Board's composition and voting system arise from legitimate state policies to exercise certain highly local powers through a regional governing unit which preserves some measure of local self-government, operates through the vehicle of established political subdivisions, functions as a small and collegial body of elected officials, assures the smaller boroughs a voice, and contains no built-in bias or other invidious element. The courts below so acknowledged.

The Court of Appeals nevertheless explicitly approved the District Court's decision to "scrutinize[ ] alternatives, pursuant to *Connor* v. *Finch,* 431 U.S. 407, 420 (1977) and *Kilgarlin* v. *Hill,*

386 U.S. 120, 123-24 (1967)." The use of this "least restrictive alternative" analysis to assess state interests in local governing bodies is unsupported by any decision of this Court (JA38-39). Such analysis is appropriate to judicial review of the apportionment of Congressional districts, in which the states are constrained by Article I, § 2 to make a good faith effort to achieve precise mathematical equality. *Karcher* v. *Daggett,* 462 U.S. 725, 730 (1983). Similarly, where a federal court has been thrust into the role of fashioning state or local elective districts, a legislative task for which the federal courts are ill-suited and which they "should make every effort not to pre-empt" (*Wise* v. *Lipscomb,* 437 U.S. 535, 539 [1978]), the "latitude in court-ordered plans for departure from the *Reynolds* standards . . . is considerably narrower than that accorded apportionments devised by state legislatures, and . . . the burden of articulating special reasons for following such a policy . . . is correspondingly higher." *Connor* v. *Finch,* 431 U.S. 407, 419-20 (1977).

But this Court has never applied this test to local governments. To the contrary, if anything, the application of a "least restrictive alternative" test to judicial review of a state apportionment plan is inconsistent with the holding of this Court in *Mahan* v. *Howell, supra,* 410 U.S. 315. There, this Court refused to apply the "absolute equality" standard applicable to congressional districts and reiterated that the "proper equal protection test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.' *Reynolds* v. *Sims, supra,* at 580-81." 410 U.S. at 326. Likewise, in *Brown* v. *Thomson, supra,* decided the same day as *Karcher,* this Court did not point to the presence or absence of any alternatives to affording a full legislative representative to Wyoming's smallest county.

Under the equal protection clause, a reasonable relationship must exist between the deviation and the asserted justification. *Mahan* v. *Howell, supra* at 326; *see also Kilgarlin* v. *Hill,* 386 U.S. 120, 123-24, (1967) (state policy permitted violation of county lines; court should have articulated basis for rejecting plans which respected county lines but with smaller deviations). There is, however, no basis for requiring a state to show that the justifying policies could not be effectuated through some different

system such as weighted voting or proportional representation. (JA101-109). The consequence of the contrary rulings below is to shift from the states to the courts the ultimate authority to decide whether a particular "alternative" best suits the needs the states perceive—to place judges, not lawmakers, in the role of fashioning substate governmental units.

This Court should not countenance such a shift of responsibility—and certainly not without a full and plenary hearing. The question whether the "least restrictive alternative" test applies in apportionment cases involving local governments is substantial, is of broad significance throughout the country, and merits review by this Court.

(4)

We finally note the irony implicit in the decisions below. In *Baker* v. *Carr*, 369 U.S. 186 (1962) and *Reynolds* v. *Sims*, *supra*, 377 U.S. 533 (1964) this Court broke the impasse which resulted from the failure of states to reapportion their legislatures to conform to the changes in demographics which occurred during the twentieth century. Such irrational malapportionment of power, when found on the local level, was similarly nullified by this Court, but always with the recognition that the one person, one vote rule would not serve to frustrate the ability of municipalities to fashion innovative responses to their myriad needs and responsibilities. *See, e.g., Avery* v. *Midland County*, *supra*, 390 U.S. at 485. The decisions below—in failing to consider the special nature of the Board of Estimate, in ignoring the citywide component of representation on the Board of Estimate, and in applying a "least restrictive alternative" analysis to the policies advanced by the Board's voting structure—can only serve as a roadblock to local elected bodies to achieve, through innovative combinations of representation, substantial population equality while assuring strenuous representation for local concerns. While this Court has indicated that one response to the friction between local concerns and voter equality is to appoint rather than elect members of local bodies (*see Sailors* v. *Board of Education*, *supra*, 387 U.S. at 110-111), we do not think that the substitution of appointive rather than elective representation need

be the sole option left to local units of government. The judgment below is not only erroneous, but will necessarily limit the prerogatives of local governments in formulating innovative forms of elective representation while preserving substantial population equality. This Court should give plenary review to that judgment.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of the appeal.

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